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Kocolene Oil Corporation, Indianapolis, Indiana (Case No. FEA-0208, Filed 7-19-74, Decided 12-2-74.)

Freedom of information.—Kocolene Oil Corporation appealed a Denial of Request for Information issued by the Federal Energy Administration on July 12, 1974. In considering Kocolene's appeal, the FEA found that: (i) the Forms FEO-96 filed by the Indiana Farm Bureau Co-operative Association requested by Kocolene contain confidential financial information which is exempt from disclosure under 5 U. S. C. 552(b)(4); (ii) the FEA, in its original denial, had sufficiently explained how the exemption relied upon in the denial applies to the information withheld; (iii) since identifying details cannot be stricken from the requested form, deletion of the confidential information is impossible and the entire form is exempt from disclosure; and (iv) disclosure of the requested forms would not be in the public interest since they contain sensitive commercial information. The FEA therefore concluded that Kocolene failed to demonstrate that the Denial of Request for Information issued to it on July 12, 1974, was erroneous in fact or law, and denied its appeal.

Decision and Order

On July 12, 1974, the Federal Energy Administration denied a request submitted by the Kocolene Oil Company (Kocolene) for access to certain records in the custody of the FEA. On July 19, 1974, Kocolene appealed that denial pursuant to the provisions of 10 CFR Section 202.6.

Kocolene, a nonbranded independent marketer of petroleum products, had requested all Forms FEO-96 filed by the Indiana Farm Bureau Co-operative Association, Inc. (Association), a refiner and a supplier of Kocolene. Form FEO-96, a Monthly Cost Allocation Report, must be filed with the FEA each month by all refiners subject to the Mandatory Petroleum Allocation and Price Regulations. The information requested includes the refiner's name and address, the name of its chief executive officer, the reporting period covered by the filing, the refiner's net operating income and profit margin, its cost and quantity of crude oil purchased in the base period and in the reporting period, the manner of allocation of any increases in cost of crude oil over base period costs to the covered products produced by the refinery, and the price and quantity at which all such products are to be sold in the current month (Form FEO-96 consists of 98 separate items).

Kocolene's request for copies of all Forms FEO-96 which had been filed by the Association was denied by the Acting Information Access Officer of FEA on the ground that these forms contain "monthly cost allocations, and as such would not be subject to release under the provisions of 5 U. S. C. Section 552 (b)(4)."

The provisions of 5 U. S. C. Section 552, known as the Freedom of Information Act, were implemented by the FEA in Subpart A of Part 202 of the Mandatory Petroleum Allocation and Price Regulations. The primary purpose of the Freedom of Information Act is to encourage disclosure of information held by the government to private citizens upon their request. In addition, Section 14(b) of the Federal Energy Administration Act of 1974 (the FEAA) makes it an affirmative duty of the Administrator to publish certain information "necessary to keep the public fully and currently informed."

5 U. S. C. Section 552(b) lists nine specific categories of records which are exempt from all disclosure require-

ments of the Act. (An identical list may be found at 10 CFR 202.9(a).) The fourth exemption (5 U. S. C. Section 552(b)(4)) applies to matters which are:

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential.

It was this exemption which the FEA cited in denying Kocolene's Request for Information.

In its appeal, Kocolene contends that:

(i) The initial denial violated the provisions of 10 CFR 202.5(b)(1) which requires that a denial of a request for information include "... a brief explanation of how the exemption applies to the record withheld ...". Kocolene asserts that no such explanation was provided in the FEA's denial.

(ii) The information contained in the requested Forms FEO-96 is not exempted from disclosure by 5 U. S. C. Section 552(b)(4). Although asserting that the information sought does not fall within the terms of the exemption, Kocolene presents no further documentation or authority to support this position.

(iii) Any information found to be exempt from disclosure which is contained in the requested forms could have been deleted from the copies given to Kocolene. In support of this contention, Kocolene cites as authority *Grumman Aircraft Engineering Corporation v. Renegotiation Board,* 425 F. 2d 578 (D. C. Cir. 1970).

(iv) Even if all the requested information were exempt from disclosure under 5 U. S. C. Section 552(b)(4), the FEA should disclose the information because such disclosure would be in the public interest. Kocolene asserts that the information contained on the Association's Forms FEO-96 would aid Kocolene in determining whether it should and how best to pursue the private legal remedy set forth in 10 CFR 210.83(b) against the Association.

Kocolene's initial argument asserts that FEA, in its denial of Kocolene's Request for Information, failed to explain how the exemption relied upon in the denial applies to the information withheld, as required by 10 CFR 202.5 (b)(1). However, the FEA's Denial clearly states that the requested Form FEO-96 "concerns monthly cost allocations and as such would not be subject to release under the provisions of 5 U. S. C. Section 552(b)(4)". This statement, when viewed in the context of that section's apparent purpose, was sufficient to constitute the "brief explanation" required by 10 CFR 202.5 (b)(1).

10 CFR 202.5(b)(1) is intended to assure that a person denied access to information be aware of the reasons for such denial. In this case Kocolene could easily refer to a blank Form FEO-96, which is available to the public, to ascertain specifically the type of information withheld. The manner in which 5 U. S. C. Section 552(b)(4) applies to this information is clear, and Kocolene could not and does not even claim that it was left uncertain as to the reasons for the denial.

Kocolene argues, however, that the requested information does not fall within the fourth exemption to the disclosure requirements of the Freedom of Information Act. Kocolene neither cites nor discusses any legal authority for this proposition.

According to a test set forth in a leading case, information held exempt under 5 U. S. C. Section 552(b)(4) must be either "trade secrets" or "commerical or financial information obtained from a person and privileged or confidential." *Consumers Union of United States, Inc. v. Veterans Administration,* 301 F. Supp. 796, at 802 (S. D. N. Y. 1969). Aside from the name, address, and chief executive officer of the company, Form FEO-96 consists entirely of commercial and financial information. Furthermore, the requested information is "confidential" as that term has been defined in judicial opinions. The courts have concluded that:

"the controlling test, as outlined in the legislative history of the confidential information exemption and later adopted in the *Sterling, Grumman,* and *Shapiro* decisions, is whether the documents requested could be fairly char-

acterized as the type of information that would not generally be made available for public perusal." *National Parks and Conservation Association v. Morton,* 351 F. Supp. 404, at 407 (D. D. C. 1972). (See also, *Sterling Drug Inc. v. Federal Trade Commission,* 450 F. 2d 698, 709 (D. C. Cir. 1971); *Grumman Aircraft Engineering Corporation v. Renegotiation Board, supra* at 582; *M. A. Shapiro & Co., Inc. v. Securities and Exchange Commission,* 339 F. Supp. 467, 471 (D. D. C. 1972).)

The financial information contained on Form FEO-96 is clearly of such a "confidential" character. It contains details concerning costs, quantities and prices of a refiner's operation, of the type not generally revealed to the public. Not only does Form FEO-96 contain extensive historical data revealing the cost and quantity of crude oil purchased, the quantities of products sold, and the pricing structure employed by the refiner, but it also includes specific projections of production and pricing for the current period. Such information in the hands of a competitor could conceivably be used to the detriment, in a competitive sense, of the refiners submitting the form. A refiner would not generally make such information available to its competitors or to the public.

Furthermore, the general instructions to Form FEO-96 state that the form is designed to provide FEO and the Internal Revenue Service with information necessary for them to monitor cost and price movements within the U. S. petroleum industry. No mention is made of the possibility of public disclosure of this information.

In view of the foregoing, the financial information contained in the Form FEO-96 is exempt from disclosure under 5 U. S. C. Section 552(b)(4).*

Kocolene's third assertion is that any information on the requested forms held to be exempt should be deleted, and the remainder furnished to Kocolene. Although it is proper to make such deletions to prevent the disclosure of exempted information when the remaining material is useful and meaningful, such deletions in the present case would leave only the name, address and chief executive officer of the Association. Such information is not sought by Kocolene and its disclosure in this case would serve no useful purpose. (See, e. g., *Fisher v. Renegotiation Board,* 355 F. Supp. 1171, at 1175 (D. D. C. 1973)).

Furthermore, in *Grumman Aircraft Engineering Corporation v. Renegotiation Board, supra,* the Court held that information which falls within the fourth exemption to 5 U. S. C. Section 552(b) shall be released whenever "the interests of confidentiality can be protected by striking identifying details prior to releasing the document." *Grumman, supra,* at 581. Kocolene, however, has requested the Forms FEO-96 of a specific refiner, whose anonymity cannot therefore be protected by the deletion of its name and other obvious indicia of identity. The Court, in *Grumman,* recognized this problem, stating

"[a] request for the orders and opinions concerning a single contractor would clearly create a problem of confidentiality." *Grumman, supra,* at 581.

The FEA must be careful not to reveal confidential data which has obviously been derived from a specific refiner. Since identifying details cannot be stricken from the requested form, the information contained therein must be held totally exempt from disclosure.

Kocolene's final argument in its appeal is that the information, even if found to be exempt from disclosure under 5 U. S. C. Section 552(b), should be made available because such action "would be in the public interest and would not violate any law." Kocolene cites no authority for the proposition that an agency should, due to a pressing public interest, disclose information which has been held exempt from the disclosure requirements of 5 U. S. C. Section 552, nor apparently has any court ordered an agency to do so. However, 10 CFR 202.1 requires that

* No argument is made that the information sought is contained in "public annual reports" to the SEC. Such information must be publicly disclosed by the Administrator upon request, pursuant to Section 14(b)(2) of the FEAA.

"[t]o the extent permitted by other laws, the FEO will make available records which it is authorized to withhold under 5 U. S. C. 552 unless it determines that such disclosure is not in the public interest."

As discussed above, the requested forms contain sensitive commercial information, the disclosure of which could subject the refiner submitting the forms to serious competitive harm. Such a result is clearly not in the public interest.

Finally, it should be noted that the disclosure of the financial information requested by Kocolene might well violate 18 U. S. C. Section 1905, which subjects to criminal sanctions any Federal officer or employee who discloses any information which concerns or relates to "the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association" to any extent not authorized by law.

For the reasons stated above, the Federal Energy Administration has concluded that Kocolene has failed to establish that the FEA's Denial of Request for Information issued to it on July 12, 1974 was erroneous in fact or in law.

It is Therefore Ordered That:

(1) The appeal filed by Kocolene from the Denial of Request for Information issued to it on July 12, 1974, be and hereby is denied.

(2) This is a final order of the Federal Energy Administration of which the appellant and any aggrieved party may seek judicial review.

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Pennzoil Company, Houston, Texas (Case No. A-100090, Filed 5-28-74, Decided 12-4-74).

Lubricant base stock oil.—The Pennzoil Company appealed from a Decision and Order issued by the Federal Energy Administration which required Pennzoil to supply Penn Champ, Inc. with 82,370 gallons per quarter of neutral and bright motor oil stock. Pennzoil requested that it be entirely relieved of that supply obligation. Although the FEA found that Pennzoil, contrary to its allegation, was a "supplier" of such products, the FEA granted Pennzoil's appeal and reversed and vacated the Order on the basis that the Order failed to contain a "statement of the grounds for the decision" as required by the provisions of 10 CFR 205.25.

Decision and Order

On May 28, 1974, Pennzoil Company (Pennzoil) filed an appeal from an order issued to it by the Federal Energy Administration on April 18, 1974. The order directed the firm to supply Penn Champ, Inc. (Penn Champ) with 82,370 gallons per quarter of neutral and bright motor oil stock. The product was to be supplied directly by the Pennsylvania Refining Company (Penreco), a Pennzoil subsidiary. The appeal, if granted, would relieve Pennzoil of that obligation.

Penreco historically has blended motor oils for Penn Champ under the Penn Champ brand. On June 30, 1972, Penreco shut down its crude oil refinery, and its custom canning plant was closed in 1973. Following the refinery closedown Penreco ceased supplying Penn Champ, which was then supplied base stock oils by the Southwest Grease and Oil Company (Southwest). Penreco supplied Southwest for this purpose through December of 1973.

In its Appeal, Pennzoil claims that the April 18, 1974 Order is erroneous